89-1669

Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1989

SALVATORE GRECO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

1. Did the trial court err in refusing to permit proof that the Government had recently fabricated the date of a crucial event in the case in response to the petitioner's evidence that he had an alibi for the originally stated date of the event?

Parties to the Proceedings

The names of all the defendants in this case are:

Emanuele Palazzolo, Giovanni Cangialosi, Salvatore Salamone, Giovanni Ligammari, Frank Castronovo, Gaetano Badalamenti, Salvatore Catalano, Giuseppe Lamberti, Salvatore Mazzurco, Salvatore Lamberti, Giuseppe Trupiano, Giuseppe Vitale, Lorenzo Devardo, Salvatore Greco and Francesco Polizzi.

Petitioner joins in all points raised in the certiorari petitions of the other defendants (No. 89-1565), as they may be applicable, and relies upon the appendix filed in that case, in addition to the appendix attached to this petition.

TABLE OF CONTENTS

Question Presented..... i

Parties to the Proceedings..... ii

Table of Authorities..... iv

Opinion Below..... 2

Jurisdiction..... 2

Statement of the Case..... 3

Reason for Granting the Writ

The refusal of the trial court to permit proof that the government had recently fabricated the date of the Bagheria meeting was reversible error..... 12

Conclusion..... 28

Appendix..... 29

Gov't's demand for notice of alibi, 9/30/85

Gov'ts response to alibi demand, 11/19/85

TABLE OF AUTHORITIES

Cases:

Brady v. Maryland,
373 US 83 (1963)..... 18

Chapman v. California,
386 US 18 (1967)..... 25

Fahy v. Connecticut,
375 US 85 (1963).....25

United States v. Casamento,
F.2d (2d Cir. 1989), slip op.
6609.....10,22

United States v. Castro,
813 F.2d 571 (2d Cir. 1987)..... 25

United States v. Corey,
566 F.2d 429 (2d Cir. 1977)..... 25

United States v. Lombardi,
550 F.2d 827 (2d Cir.1977)..... 22

United States v. Pierre,
781 F.2d 329 (2d Cir. 1986)..... 21

United States v. Zito,
467 F.2d 1401 (2d Cir. 1972)..... 22

Other Authorities:

29 Am. Jur. 2d Sec. 276..... 21
30 Am. Jur. 2d Sec. 1162..... 25

Fed. Rules of Appellate Procedure,
Rule 28 (i).....10

Fed. Rules of Evidence,
Rule 801 (d)(1)(B).....22

McCormick, On Evidence,
2d ed. Sec. 273, p.660.....21

28 USC 1254..... 2

In the

SUPREME COURT OF THE UNITED STATES

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SALVATORE GRECO,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner Salvatore Greco respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 11, 1989 as well as the denial by the Second Circuit of

the petition for rehearing and rehearing en banc, decided January 9, 1990.

Opinion Below

The opinion of the Court of Appeals (slip opinion pp. 6069-6185) is unreported. The 116-page opinion is reproduced in conjunction with the petition for writ of certiorari filed on behalf of all defendants, sub nom. Emanuele Palazzolo, et al. v. United States. (No. 89-1565).

Jurisdiction

The certiorari jurisdiction of this Court is invoked under 28 USC 1254.

The judgment of conviction is dated June 23, 1987.

The affirmance by the Court of Appeals is dated October 11, 1989.

The denial of petition for rehearing and rehearing en banc by the Court of Appeals is dated January 9, 1990.

This petition is filed within 90 days of the denial of rehearing.

Statement of the Case

Salvatore Greco was convicted on June 23, 1987 in the United States District Court for the Southern District of New York, after a joint trial (United States v. Badalamenti, et al.; Ind. No. SS 84 Cr. 236 (PNL)) (LEVAL, D.J. and a jury) of the crimes of narcotics conspiracy (count 1; 21 USC 812, 841(a)(1), 841 (b)(1)(a), 952, 960, 963), conspiracy to violate currency laws (count 12; 31 USC 1059(1) and (2), 1081, 18 USC 2, 31 CFR 103.22, 103.25, 1101(a)(1)(b); failure to file currency reports (count 14; 31 USC 1081, 1059, 5313(a), 5322(b), 18 USC

2), and racketeering conspiracy (count 16; 18 USC 1962(c)).

He was sentenced as follows:

count 1: 15 years in prison and $25,000 fine

count 12: 5 years in prison and $10,000 fine

count 14: 5 years in prison and $150,000 fine

count 16: 20 years in prison and $25,000 fine.

The prison sentences on counts 1 and 14 are consecutive to each other, but concurrent with the sentences on counts 12 and 16, which run concurrently. The fines on counts 1, 14 and 16 are added together, and the fine on count 12 is concurrent to the other fines.

The total sentence is therefore 20 years and the total fine is $200,000.

The Case against Salvatore Greco

The government charged 21 defendants with participating in a international narcotic smuggling and money laundering enterprise during the years 1975-1984. It resulted in a mega-trial lasting a year and a half and generated 42,000 pages of trial transcript and a mass of documents and exhibits.

As described in the government's opening, the case had two themes. The first concerned the dynamics of smuggling heroin and cocaine into the United States and the smuggling of money out of the country. For instance, the government charged that during 1982-3, over a ton and a half of drugs worth 1/3 of a billion dollars were imported from Sicily and South America and distributed in the metropolitan New York area, while millions of dollars were taken out to Switzerland and Brazil (34-5).

The second theme was the mafia, its organization, discipline and workings. It was this secret criminal organization and the way it functioned, the government charged, that enabled the crimes to be committed in a systematic and continuing way (35-6).

In this setting, the government identified some of the defendants as part of supply groups sending the drugs into the United States. One of these supply groups, based in Sicily, was headed by Leonardo Greco, the brother of the petitioner Salvatore Greco (40).

Seven other defendants were classified as a "core group" in the United States. Five of these operated in New York City. The other two, operating in New Jersey, were Gaetano Mazzara and Francesco Castronovo, who were also business partners in a pizzeria known as the Roma Restaurant in

Menlo Park (37-9). This core group, the government charged, ordered the narcotics, distributed it and sent the money back overseas.

The petitioner Salvatore Greco, the proprietor of a pizza place, Sal's, in Neptune City, New Jersey, was charged by the government with working with the New Jersey group, one of whom, Castronovo, was the petitioner's cousin. In addition, Greco's association with an employee of his pizzeria, Fillipo Salamone, was regarded as incriminating because Fillipo and his brother, Salvatore Salamone, were identified as money couriers and launderers.

The government's case against Sal Greco had two separate parts. One was the accusation that Sal Greco had been present at a farm house in Bagheria, Italy in early 1980 where narcotics were tested prior to their attempted shipment to the United

States. This allegation was based solely on the testimony of a turned mafia member, Salvatore Contorno.

The second part consisted mainly of surveillance testimony about Greco's movements and associations from March, 1983 to August, 1983. From it the government sought to draw the conclusion that Greco was part of the money laundering and RICO conspiracies uncovered with respect to other defendants. In particular, his associations with F. Salamone, an employee, Frank Castronovo, Greco's cousin, and Tommy Mazzara, Castronovo's business partner, provided the main thrust of the government's proof.

In addition, the surveillances provided the testimony for a RICO count predicate violation of the Interstate Travel and Transportation Act. The ITTA overt act was based on an evening trip to Philadelphia by

Greco, where, along with Mazzara and another person, they visited a patient in a Philadelphia hospital on August 19, 1983. The RICO predicate crime itself was based on a surveillance of Greco a few days later. Greco was observed delivering a small package, the contents of which are unknown, to the pizza place of Rosario Dispenza in Manhattan on August 24, 1983. Dispenza was identified as a money launderer when, five months later, his house was searched and approximately $400,000, some of it in marked money, was uncovered.

Finally, a search of the petitioner's pizzeria on April 9, 1984 uncovered a cache of weapons hidden in the ceiling, though other testimony linked the purchase and installation of the weapons with the Salamone brothers. $10,000 in cash and empty bank money-wrappers found during the search of Greco's car and premises on April

9, 1984, as well as a statement made by Greco upon arrest and argued by the government to have been false, concluded the government's case against Greco.

In the Second Circuit, petitioner argued several issues unique to himself, as well as joining in other points in common with other defendants. For his own issues, petitioner argued that the evidence on the money laundering and RICO counts were insufficient, United States v. Casamento, F.2d (2d Cir. 1989) (slip op. pp.6109-13), and that the trial court erred by refusing to permit proof that the government had recently fabricated the date of the Bagheria meeting to avoid Greco's alibi for the original date stated by the government. (id. slip op. pp.6139-42). It is this last point on which this petition is based.

The petitioner also adopts by reference, according to Rule 28 (i) of the

Federal Rules of Appellate Procedure, any and all arguments contained the briefs of the other co-petitioners.

REASONS FOR GRANTING THE WRIT

THE REFUSAL OF THE TRIAL COURT TO PERMIT PROOF THAT THE GOVERNMENT HAD RECENTLY FABRICATED THE DATE OF THE BAGHERIA MEETING WAS REVERSIBLE ERROR

In the government's opening the prosecutor told the jury about a crucial event in the case. There was a meeting, he said, on February 14, 1980 in Bagheria, Italy during which several of the conspirators, including Sal Greco, Mazzara, Castronovo, Catalano and Ganci, field tested a batch of heroin in the kitchen of a farm house (51). This heroin was seized a month later, on March 18, 1980 by Italian authorities (52).

In the defense opening, Greco's counsel responded by pointing out that the indictment never mentioned Greco being at any such meeting, and that he would prove in court that Greco had not been there (205).

Two days later, the government presented Greco with a demand for notice of alibi, stating that "the government intends to present testimony which will establish that Salvatore Greco was present with the defendants...at a farm house located near Bagheria, Palermo, Sicily sometime shortly prior to approximately February 14, 1980" (Demand, p.1). Noting that the defense opening "averred that the Government had lied about Greco's participation in the testing episode", the government "demands to know the specific place or places at which the Defendant Greco claims to have been during the three weeks prior to February 14, 1980 and the names...of...witnesses upon whom the Defendant intends to rely to establish such alibi" (Demand, p.2). In response, the defendant referred to a series of checks that the government had seized from Greco's residence, which were executed

and presented by Greco in the United States on February 14, 15, 26 and 28 (Exhs. S 114; A,B & C; Exh. 603L). In addition, a witness at a travel agency in New Jersey had a record and memory of Sal Greco picking up tickets on February 14 for a March 2 trip to Italy (35423-4). The government obtained this latter information when the FBI visited the travel agent for the first time on November 6, 1985 (36389), 12 days after their opening statement. The government then filed a "response to Greco's alibi demand" on November 19, 1985, now stating that "the Government can specify that the testing session occured in the vicinity of Bagheria, Sicily, sometime between approximately February 1 and March 15, 1980." (Gov'ts Response, November 19, 1985).

The only government witness to the Bagheria meeting - and thus the only person who could tell the government the date on

which the meeting occured - was Salvatore Contorno, a mafia criminal, who was expecting and receiving substantial consideration for his testimony. By the time he took the stand, however, five weeks after the trial began, the government had firm documentary proof that Greco had been in the United States during the month of February, and that if the Bagheria meeting had occured on or before February 14, as the government claimed in its opening and in its Demand for Notice of Alibi, then Greco could not have been present.

In the event, when Contorno testified about the Bagheria meeting, he switched the date. It was now no longer February 14. Rather, Contorno's direct examination elicited the sly response that the date of the meeting was "February, March" (4386). He explained that 10 or 15 days after the meeting, he was shown a newspaper and told

that the goods seen in Bagheria "were lost", having been seized in Milan (4539-40). On cross-examination Contorno again repeated the date as February or March, 1980 (4921, 5333). He said he was shown the newspaper article the day after the seizure, and that the seizure was March 18, 1980. The meeting at Bagheria was 10 or 15 days before the seizure (5333-5), a date which obviously must fall in March, not February. Indeed, the court eventually instructed the jury that the government claimed the date was prior to March 19 (35418). Contorno admitted he made a statement under oath to AUSA Martin on August 13, 1985 saying the meeting took place in February (5344). He was then asked point blank whether he told prosecutor Stewart or any other member of the prosecution "that this Bagheria meeting took place on February 14, 1980 or sometime prior thereto?" He denied it. "But I never

did specify the date, because I don't know whether it was the 13th or the 14th or the 15th. I can't be specific." (5345). He again insisted that the date was "February, March" (5345), and denied that the government told him to say, "February, March" (5346). Greco's alibi for February 14 was neatly finessed.

It was, to say the least, a reasonable possibility that Contorno had recently fabricated his trial testimony about the date of the Bagheria meeting after learning that Greco had a good alibi for the date he originally gave. Thus, to establish that the switching in dates was, in fact, a recent fabrication on Contorno's part, the defense made an offer of proof to introduce the government's alibi demand into evidence or to call the prosecutor who had received the information from Contorno to explore the evolution of his testimony about the date of

the Bagheria meeting (36468-70, 36481, 36484, 36485-6). Both offers were rejected by the Court (36484, Order of Jan. 14, 1987).

The court recognized that if Contorno had made inconsistent statements to the government about the date of the Bagheria meeting, "it would be of great significance to the defense" (36474), and the government admitted that if he had made such a statement its obligation under Brady v. Maryland, 373 U.S. 83 (1963) would be to disclose it (36474). Prosecutors Stewart and Martin maintained, however, that Contorno had not told them the date of the Bagheria meeting was February 14 (36470-1, 36474-5, 36482). Stewart said that he had never debriefed Contorno and had not spoken to him about his testimony (36471, 36481). Rather, he placed the date of the Bagheria meeting on February 14 or before because

Castronovo, who Contorno had named as one of the participants, had left Italy on February 14 (36473).

The court accepted these representations and denied the motion to call prosecutors as witnesses to explain how they had fastened on February 14 as the date (36481-4). The court's position was that since the prosecutors had no testimony to give about any prior inconsistencies, there was no reason to put them on the stand (36504). The court did concede, however, that the defense could make an argument on summation about recent fabrication, based on any evidence in the record (36484).

The application was then renewed to admit into evidence the portion of the Demand for Notice of Alibi in which the government specifically stated the February 14 date (36485-8), the purpose being to allow the defense to quote that portion as

part of their recent fabrication argument in summation (36501-5). The reason this was necessary was because the government was equivocating about whether the exact words in their opening statement, which had mentioned February 14, had definitively identified the Bagheria meeting as occuring on that date. (36469, 36504-5). There was no such possible equivocation regarding the statement in the Demand, which unmistakably stated the date as February 14. After argument (36505-11), the court took the question under advisement, and then issued its order denying the application (Order of Jan. 14, 1987).

Thus, the bottom line was that the defense was allowed to argue recent fabrication in its summation, but was unable to introduce a primary piece of evidence to back it up. By the same token, the government was allowed to argue in its

summation that it had not changed its position, while the proof that it had was excluded.

Fabrication of evidence by a party or a witness is, of course, both relevant and meaningful. It is an admission by conduct. e.g. McCormick, On Evidence, 2d ed. Sec. 273, p.660. Its tendency is to discredit the case of the fabricator, to raise inferences that his case is weak or false, and that what he is trying to fabricate would be unfavorable or untrue. e.g. 29 Am.Jur.2d Sec. 276, p.326-7.

Usually the claim of recent fabrication arises in situations where a prior inconsistent statement on which the claim is based allows the party charged with the fabrication to prove a prior consistent statement made before the motive to fabricate arose. e.g. United States v. Pierre, 781 F.2d 329 (2d Cir. 1986); United

States v. Lombardi, 550 F.2d 827 (2d Cir. 1977); United States v. Zito, 467 F.2d 1401, 1403-4 (2d Cir. 1972); Fed. R. Evid., 801(d)(1)(B). Here, the government denied that there was any prior inconsistent statement by Contorno, and the Second Circuit hinged its affirmance on this fact. United States v. Casamento, F.2d (2d Cir. 1989), slip.op. p.6141). Yet this is not a complete or decisive answer. While it is common in recent fabrication cases for one witness to switch a position, this is not the only way a fabrication can be made. The party itself can change a position in response to a motive to change. For instance, a party in its pleadings can take one position and then at trial or in supplemental pleadings can change its position. If it is in response to an intervening motive to fabricate, it is a recent fabrication. Here, the government's

original assertion of February 14 as the date of the Bagheria meeting was an admission of a party, and the same party - the government - switched its position to conform to the evidence that its first date was inaccurate. Since the government was then allowed to argue in summation that it had never changed its position, the introduction of the alibi demand was necessary and relevant to show a change of position had actually occured. In short, the government was allowed to argue to the jury that their position had been consistent throughout - "February, March" - when, in fact, the alibi demand proved they had originally and specifically designated February 14. Thus, the Second Circuit dodged the real issue, which was that the government had changed its position (with or without Contorno) and the defense was not allowed to show it.

Moreover, sight must not be lost of the fact that this issue concerned the seminal event in the case, as far as Greco was concerned. He was placed at a meeting where drugs were tested, where he was identified, along with all the others, as a mafia member, and were he was associated with the Kingpins in the case, Catalano and Ganci. Contorno's testimony thus provided the foundation for Greco's implication in the narcotics conspiracy charged in count 1. Moreover, the narcotics conspiracy provided one of the two predicate acts for the RICO count. Further, it was inevitable that anything Greco did thereafter, whether in connection with drugs or not, would be infected by the view of him provided by Contorno and the Bagheria event. His associations with other conspirators in relation to their money laundering activities, for instance, would not be seen

as "mere" association, but as deliberate criminal conduct. Thus all three counts against him were hinged to his alleged participation in the Bagheria meeting.

An alibi, it has been said, "is the most perfect, physically conclusive evidence of the accused's innocence." 30 Am.Jur.2d Sec. 1162, p.336. Thus if the jury had believed that the government had waffled the date of the Bagheria meeting to undermine Greco's alibi, the case against Greco might well have taken a different turn. For an error to be harmless, it must be "highly probable that the error did not contribute to the verdict." United States v. Corey, 566 F.2d 429, 432 (2d Cir. 1977); United States v. Castro, 813 F.2d 571, 577 (2d Cir. 1987); also see, Fahy v. Connecticut, 375 U.S. 85 (1963); Chapman v. California, 386 U.S. 18 (1967). This is easily met in the circumstances here, since all the counts

against Greco are pivoted on Contorno's marking him as a conspirator. Guilt or innocence is directly implicated.

In sum, then, it is the right of any party to prove that an opposing party or witness has recently fabricated testimony by presenting extrinsic evidence to show that witness or party originally claimed something else and the prompt for the change. It was therefore error to exclude full proof exploring the evolution of the government assertions in their opening and Alibi Demand Notice that the date of Bagheria was February 14; that thereafter they learned Greco had an air-tight alibi for that day; and that thereafter the date was switched to a time in March. Allowing the defense to argue recent fabrication to the jury, while at the same time denying them the right to present existing competent evidence to substantiate their claim was a

half-way solution, but a fully erroneous legal ruling. By the same token, allowing the government to argue on summation that no change in date had occured, while excluding the evidence that a switch had been made, was also erroneous. Because this error concerned the decisive event in the case against Greco, it was extremely prejudicial and reversal is required.

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

Respectfully submitted,

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SALVATORE GRECO

APPENDIX

A1197

Government's Demand
for Notice of Alibi

October 30, 1985

RCS:mm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

-v- : SS 84 Cr. 236 (PNL)

GAETANO BADALAMENTI, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

D E M A N D

THE UNITED STATES STATES OF AMERICA, by and through Rudolph W. Giuliani, United States Attorney for the Southern District of New York, and Robert C. Stewart, Department of Justice Attorney, hereby makes demand upon Larry Bronson, Esq., as counsel for the defendant Salvator Greco, for written notice of an alibi defense, pursuant to Rule 12.1 (Fed. R. Crim. Proc.); and, as grounds in support of the said Demand, the Government says the following:

The Government intends to present testimony which will establish that Salvatore Greco was present with the defendants Catalano, Ganci, Castronovo and Mazzara at a farm house located near Bagheria, Palermo Province, Sicily sometime shortly prior to approximately February 14, 1980. At that time, the said defendants tested and marked certain packages of heroin. These were part of a 400 kilogram shipment, which was seized by Italian authorities on or about March 18, 1980 in Milan, Italy.

RCS:mm

On October 28, 1985, Mr. Bronson averred that the Government had lied about Greco's participation in the testing episode.

Since the Government is absolutely positive that it did not lie about the anticipated testimony, two explanations are possible: Either the Government's witness has incorrectly identified the defendant Greco or Greco has falsely asserted to this counsel that he was not a participant in the testing incident. In the latter case, it is reasonable to assume that Greco will endeavor to fabricate an alibi defense to support his false assertion to counsel.

WHEREFORE, the Government demands to know the specific place or places at which the Defendant Greco claims to have been during the three weeks prior to February 14, 1980 and the names and addresses of any and all witnesses upon whom the Defendant intends to rely to establish such alibi.

Respectfully submitted,

RUDOLPH W. GIULIANI
United States Attorney
Southern District of New York

By: Robert C. Stewart
ROBERT C. STEWART
Department of Justice Attorney

Date: October 30, 1985
Place: New York, New York

A1200

Government's Response
to Alibi Demand

November 19, 1985

RCS:mm

A1201

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

- v - : SS 84 Cr. 236 (PNL)

GAETANO BADALAMENTI, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - -x

GOVERNMENT'S RESPONSE TO
GRECO ALIBI DEMAND

The UNITED STATES OF AMERICA, by and through Rudolph W. Giuliani, United States Attorney for the Southern District of New York, and Robert C. Stewart, Department of Justice Attorney, makes the following response to Mr. Bronson's "Counter-Demand" of November 7, 1985, which was served on the Government last week:

Based upon the present state of the evidence, the Government can specify that the testing session occurred in the vicinity of Baheria, Sicily, sometime between approximately February 1, 1980 and March 15, 1980. The Government cannot be more precise than this and makes its demand accordingly.

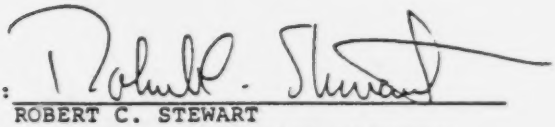
RCS:mm

A1202

WHEREFORE, the Government requests that Counsel comply with the Demand seasonably.

Respectfully submitted,

RUDOLPH W. GIULIANI
United States Attorney
for the Southern District of
New York

By: 
ROBERT C. STEWART
Department of Justice Attorney

Date: November 19, 1985
Place: Manhattan, New York